Supreme Court, U.S.
FILED

No. 97-1874

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In The

Supreme Court of the United States

October Term, 1997

HOLT CARGO SYSTEMS, INC.,

Petitioner,

vs.

BERNARD KEIFER, SR.,

-and-

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In the face of clear Congressional intent to deny coverage under the Longshore Harbor Workers' Compensation Act 33 U.S.C. § 1, *et seq.* to land based truck drivers who happen to be injured on a maritime situs, may nevertheless *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 69 (1977) be read by the longshore administrative authorities and the federal courts of appeal to provide coverage under the Act for these workers whose maritime employment constitutes a de minimus portion of their usual land based non maritime work, if they happen to be injured on a covered situs.

2. Does this Court's Decision in *Northeast Maritime Terminal v. Caputo*, 432 U.S. 69 (1977) permit coverage under the Longshore Harbor Workers' Compensation Act 33 U.S.C. § 1, *et seq.* (the Act) for workers who at most occasionally perform maritime work but whose essential and regular employment is non maritime who are injured on a maritime site doing their usual non maritime work.

STATEMENT PURSUANT TO RULE 29.6

Petitioner Holt Cargo Systems, Inc. is wholly owned by Holt Group, Inc. There are no nonwholly owned subsidiaries of Holt Group, Inc. or Holt Cargo Systems, Inc. Neither Holt Group, Inc. nor Holt Cargo Systems, Inc. is publicly owned.

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OPINIONS BELOW

The Court of Appeals entered a Judgment Order, not an Opinion. (App., *infra* 1a). The Decision of the Benefits Review Board (App., *infra* 3a) is unreported. The Decision of the Administrative Law Judge (App., *infra* 9a) is reported at 30 BRBS 294 (ALJ) (1996).

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgement on February 23, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Longshore and Harbor Workers' Compensation Act 33 U.S.C. § 1, *et seq.* in particular Sections 902(2), 902(3), 902(4).

STATEMENT OF THE CASE

A. Proceedings Below

Respondent, Keifer, a Teamster truck driver sustained a work related injury to his left ring finger on June 16, 1993 at a marine terminal located in Camden, New Jersey operated by the employer, Holt Cargo Systems, the Petitioner. Petitioner challenged jurisdiction under the Longshore Harbor Workers' Compensation Act 33 U.S.C. § 1, *et seq.*, taking the position that Keifer lacked maritime status for coverage under the Act but was otherwise entitled to compensation under the provisions of the Pennsylvania Workers' Compensation Act (Act of 1915, P.L. 736, No. 338, as amended 77 P.S. 101, *et seq.*). Keifer therefore received compensation under the Pennsylvania Act

for a period of disability between June 16, 1993 through April 27, 1994 when he returned to his usual pre-employment job with Petitioner without loss of earnings or earning power. His claim for residual impairment of the left ring finger was not compensable under the Pennsylvania Statute.

Keifer filed a claim for coverage under the provisions of the Longshore Harbor Workers' Compensation Act (the Act) 33 U.S.C. §§ 908(c)(9), 908(c)(19), claiming that he was a maritime employee and was entitled to coverage for a permanent partial disability of the finger.

The case went to formal hearing before Administrative Law Judge Robert D. Kaplan who after hearing on November 7, 1995 issued a Decision and Order dated April 29, 1996 denying Keifer's claim for benefits under the Act. *Keifer v. Holt Cargo Systems, Inc.*, 30 BRBS 294 (ALJ) (1996). Keifer filed a Notice of Appeal with the Benefits Review Board (the Board) which entered an unpublished Decision on briefs without oral argument dated April 28, 1997 reversing the Decision of the Administrative Law Judge and remanding the case to the ALJ for the entry of an award of permanent partial disability, the amount of which having been stipulated by the parties in the event of coverage under the Act.

Petitioner filed a Petition for Review of the Board's Decision in the United States Court of Appeals for the Third Circuit on June 9, 1997, appellate jurisdiction being based upon 33 U.S.C. § 921(c) of the Act.

After oral argument, in a Judgement Order dated February 23, 1998 the Circuit Court denied Holt Cargo System's Petition for Review of the Decision and Order of the Benefits Review Board.

B. Statement of the Facts

As found by the Administrative Law Judge in his Decision, the parties stipulated that the injury occurred on a situs covered under Section 903(a) of the Act. The parties also stipulated that the employer was a maritime employer within the meaning of Section 902(4) of the Act and that there was an employer/ employee relationship at the time of the injury. Likewise there was no disagreement over the period of temporary total disability nor to the extent of permanent partial disability if it was determined that there was coverage under the Act for this injury.

Keifer received workers' compensation benefits under the state of Pennsylvania system at the weekly rate of $475 per week. By claiming coverage under the Longshore Act Keifer sought a higher compensation rate of $512.80 per week.

Keifer was employed by the Petitioner as a truck driver and was a member of the Teamsters Union. 95% of Keifer's time in the employment of Petitioner was involved in non maritime land based transportation of cargo to and from maritime terminals. Keifer's responsibilities did not include loading cargo onto his truck at maritime sites. This was the duty of the longshoremen who in fact were actually loading Keifer's truck on the day of his accident. Keifer's job was to ensure that the cargo loaded onto his truck by the stevedores was secure so that it would not shift when he took it off terminal to make delivery. Keifer did not work on vessels and was not involved in the loading and unloading of cargo to or from vessels.

The injury to Keifer's finger occurred while the longshoremen were loading pipe onto his truck. Keifer testified that in order to insure that the cargo was securely fastened, his responsibility as truck driver was to tie down the load and to check it out, not to actually load and unload it himself. He was

injured when a pipe standard used to steady the load fell onto his finger.

Keifer also testified that occasionally he transported equipment used in the loading and unloading process around the terminals to and from repair areas. He was less than clear as to how often this occurred but at most it seems to have been less than once a week, for an unspecified period of time.

Testimony from the employer's operation manager, Paul Rand, confirmed that Keifer spent 95% of his time hauling cargo off and on to terminals. Rand testified that occasionally Keifer was told to take equipment from one warehouse to another (whether on maritime locations or not) and that occasionally Keifer would drive a forklift onto his truck in order to transport the forklift.

The Administrative Law Judge entered Decision in *Keifer v. Holt Cargo Systems, Inc.*, 30 BRBS 294 (ALJ) (1996) denying benefits under the Act finding Keifer lacked maritime employment status under Section 902(c) stating that any arguable longshore or maritime activities were not an essential part of Keifer's job duties and were not integral or essential to the loading and unloading of maritime cargo. In making this determination, the Administrative Law Judge noted that claimant bore the burden of proof on jurisdiction and the Administrative Law Judge somewhat charitably described the claimant's recollection regarding the amount of time spent transporting equipment used in the loading and unloading process as far from crystal clear and in summary not a significant portion of the claimant's total working time.

The Benefits Review Board to whom Keifer took appeal, in an unpublished Decision, determined that Keifer was covered by the Act even though 95% of his job duties constituted activity

not covered by the Act. The Board, citing this Court's *Northeast Maritime Terminal Co., Inc. v. Caputo*, 432 U.S. 69 (1977) along with Decisions of the Courts of Appeal and the Board's own case law held that the Administrative Law Judge applied the wrong legal standard in determining Keifer's status under the Act. The Board held that if a claimant regularly performs some portion of what was indisputably longshore work, there is coverage under the Act, no matter how infrequent those maritime duties were if those duties were a regular part of the claimant's overall duties and were not episodic or irregular. The Board made no mention of Congressional intent to exclude truck drivers from coverage under the Act and basically held that a worker injured on a maritime situs is covered under the Act if he performs any sort of regular maritime work even if his job otherwise is essentially non maritime and he is injured while performing his usual non maritime work.

The Court of Appeals, without opinion, affirmed the Board in a Judgement Order dated February 23, 1998.

REASONS FOR GRANTING THE WRIT

I.

THE QUESTION PRESENTED IS IMPORTANT

Acceptance of this case by the Court will allow the Court to consider and address the Congressionally unintended expansion of coverage under the Longshore Harbor Workers' Compensation Act 33 U.S.C. § 1, *et seq.* to land based non maritime workers. The Congress did not intend to include workers only transiently on maritime sites who may occasionally perform maritime work such as the transportation of equipment used in the loading and unloading process by other workers.

That the Court of Appeals did not actually enter an Opinion in this case is not a bar to review by this Court. *Transamerican Freight Lines v. Brada Miller Freight Systems*, 423 U.S. 28, 34 (1975).

In the years since this Court's Decision in *Northeast Maritime Terminal Co. v. Caputo*, 432 U.S. 249, 97 S. Ct. 2348 (1977) the longshore administrative authorities and the courts of appeals have unnecessarily and unjustifiably provided coverage under the Act to workers never intended to be covered and who otherwise have adequate remedies through state workers' compensation systems for their job related injuries. Acceptance of a Writ of Certiorari in this case will permit the Court to stop the duplicative filings by employees whose maritime connection is de minimis but who seek resort to federal coverage when injured on a maritime site. Potentially, thousands of employers and workers will be impacted by this Court's Decision on the merits.

This Court in *Northeast, supra* held unanimously that its Decision was influenced by the legislative history in the Congressional reports to the 1972 amendments to the Act which demonstrated the intent of Congress to cover employees involved in loading, unloading, repairing or building a vessel. *Northeast, supra* at 265 n.26. The Congressional committee reports contained a typical example of covered employees:

> The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The

> employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. *Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered. . . .*

432 U.S. at 267, n.28, citing Report No. 92-1125, 92nd Congress, 2nd Session 13, 1972 U.S. Code Cong. & Admin. News 4708 (emphasis added). The Court in *Northeast Marine Terminal* found that the above example clearly indicated an intent by Congress

> to cover those workers involved in the essential elements of unloading a vessel, taking cargo out of a hold, moving it away from the ship's side and carrying it immediately to a storage or holding area. The example also makes it clear that persons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered. *Thus, employees such as truck drivers whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transportation are not covered.*

432 U.S. at 266, 97 S. Ct. at 2359.

This legislative history permits interpretation that maritime workers whose duties or occupations are mentioned in the Act, 33 U.S.C. § 902(3) were intended to be covered under the Act no matter what they were doing on a covered situs, if they were

otherwise injured in the course of employment. This rationale, however, cannot be used to provide coverage to individuals such as Keifer, a non maritime trucker, simply because he may occasionally perform work considered maritime when the fact finder in this case held that the duration of any maritime work was at best less than once a week for an unspecified period of time.

Keifer, as a truck driver, was not covered under the Act before the 1972 amendments. What he was doing at the time of his injury on a maritime situs is indeed relevant although perhaps not determinative of maritime status. If Keifer had been moving equipment used in the loading and unloading process when he was injured, Petitioner believes he would be covered under the Act if the injury occurred on a maritime site, as the Congress expressly intended to cover those injured while involved in maritime employment on a covered situs. *See Chesapeake and Ohio Railroad Co. v. Schwalb*, 493 U.S. 40, 110 S. Ct. 381 (1989).

The lower courts and the Benefits Review Board, however, have distorted this Court's holding in *Caputo* to support the untenable position that Congress intended to provide longshore coverage to workers whose job at its core and essence is non maritime if that worker did some sort of maritime work no matter how seldom as long as it could be called regular as opposed to irregular. This unnecessary and unwarranted expansion of the Longshore Act to include workers regularly involved in land based trucking commerce should be stopped. Workers such as Keifer have an adequate remedy for their land based injuries, namely the state workers' compensation systems.

As the employer denied that claimant had necessary maritime status for coverage under the Act, claimant had the burden of proof on the jurisdiction issue by preponderance of the evidence.

Director, OWCP v. Maher Terminals, 512 U.S. 267, 114 S. Ct. 2251 (1994). Factual findings of an administrative law judge are considered final if supported by substantial, competent evidence in the record considered as a whole. *Sea-Land Service, Inc. v. Rock*, 953 F.2d 56 (3rd Cir. 1992). As the Board is not a policy making agency, its interpretations of the Act are not entitled to special deference by the Courts. *Potomac Electric Power Company v. Director, OWCP*, 449 U.S. 268, 278 n.18, 101 S. Ct. 509 (1980).

This Court in *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 105 S. Ct. 1421 (1985) clarified the intent of the 1972 amendments by stating that while maritime employment is not limited to the occupations specifically mentioned in Section 902(3), that Section cannot be read to eliminate any requirement of a connection with loading and unloading or construction of ships. The maritime employment requirement is an occupational test focusing on loading and unloading, *Pfeiffer Company v. Ford*, 444 U.S. 69, 100 S. Ct. 328 (1978). The ALJ in his Decision, after rejecting claimant's other contentions for coverage as maritime employee under Section 902(3) stated that the occasional transportation of equipment used in the loading and unloading process from one terminal to another or to a repair area, like the repair of the equipment itself constituted longshore work. The ALJ cited *Chesapeake & Ohio Railroad Co. v. Schwalb*, 493 U.S. 40, 110 S. Ct. 381 (1989) as support. The Supreme Court in *Schwalb* found coal port facility laborers involved in repair and maintenance services of equipment essential to the loading and unloading process at the port to be covered when they were injured doing a job integral to the loading process, *i.e.*, equipment maintenance. *Schwalb* did not involve the actual transportation of equipment, however, like the instant matter. Arguably, however, such work may be considered indisputably longshore but under the facts found by the ALJ, such work here was irregular, occasional and

episodic at best. The ALJ was correct in concluding that the claimant's arguable longshore employment was not an essential part of his overall job duties and was too minor to permit him to be considered an employee under Section 902(3) of the Act.

To summarize, this Court has held in *Schwalb* and *Herb's Welding* that Section 902(3) status is confined to employees on a covered situs involved in essential or integral elements of the loading and unloading process, which is to say in another way, that persons who are on the situs but not engaged in the overall process of loading and unloading are not covered *Northeast, supra.* Congress had in mind to cover persons whose employment is such that they spend at least some of their time in indisputably longshoring operations *Northeast* at 272-273. The Court in *Northeast* also stated that employees such as truck drivers whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transportation are not covered *Northeast* at 266-267.

Keifer's employment was essentially non maritime and any arguable maritime employment, *i.e.*, the movement of equipment used in loading and unloading was not sufficient to provide coverage. The Board's position, on the other hand, would permit Keifer, an employee who spends only a small portion of his time doing maritime work to be covered under the Act for injuries on a maritime situs while doing his usual non maritime work. Congress, we submit, did not intend this result when it amended the Act in 1972 nor do the Decisions of this Court support the result reached by the Board and affirmed by the Circuit Court.

II.

A CONFLICT EXISTS AMONG THE OPINIONS OF THE UNITED STATES COURTS OF APPEAL

There is a conflict among the Courts of Appeal in respect to determinations of status under the Act. The Third Circuit in the instant matter has in effect endorsed the Board's rationale and therefore the Circuit is directly at odds with the Ninth Circuit's Decision in *Dorris v. Director, OWCP*, 808 F.2d 1362 (9th Cir. (1987). The Ninth Circuit in facts very similar to the instant case found that a claimant who was a truck driver was not entitled to maritime status where his regular duties included driving the truck to and from the docks for receiving or removing containers, the fastening of those containers on the chassis of the truck and moving those containers between births located in different harbors. The Ninth Circuit in *Dorris* refused to find maritime status even though Mr. Dorris spent some time involved in activities integral to the loading and unloading process.

Indeed the Third Circuit's Order in the instant matter is at odds with its previous Decision in *Sea-Land Service v. Rock*, 953 F.2d 56 (3rd Cir. 1992). In *Sea-Land Service*, the Third Circuit held that land based activity occurring within a Section 903 situs other than those activities explicitly listed in Section 902(3) should be deemed maritime only if it is an integral or essential part of the chain of events leading up to loading, unloading, or building of a vessel. The Third Circuit in *Sea-Land Service, supra* denied covered to a van driver even though he occasionally transported longshoreman at a maritime site, holding that coverage under the Act could not be provided for infrequent activity undertaken by this employee.

In conclusion, since the Decisions in *Sea-Land Service* and *Dorris*, the Courts of Appeal, evidenced by the Decision in the

instant matter have moved to broaden coverage to include workers whom the Congress never intended to be covered under the Act. We respectfully urge the Supreme Court to resolve these conflicts and to restore more uniformity to the analysis of status issues for workers only occasionally involved in maritime employment.

CONCLUSION

Petitioner respectfully urges the Court to grant this Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED FEBRUARY 23, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 97-3314 and 97-3574

HOLT CARGO SYSTEMS, INC.,

Petitioner in both cases

v.

BERNARD KEIFER, SR.; DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents in both cases

On Petition for Review of a Decision and Order of the Benefits Review Board and of a Decision and Orders of an Administrative Law Judge
(Benefits Review Board No. 96-1059)
(OWCP No. 02-111795)

Argued February 10, 1998

BEFORE: GREENBERG, NYGAARD, and MCKEE,
Circuit Judges

Appendix A

JUDGMENT ORDER

After consideration of the contentions raised by petitioner, it is

ADJUDGED and ORDERED that the Petition for Review of the Decision and Order of the Benefits Review Board issued April 28, 1997, be and is hereby denied. The Petition for Review of the Decision and Orders of the Administrative Law Judge is dismissed for lack of jurisdiction.

Costs taxed against petitioner.

BY THE COURT:

s/ [illegible]
Circuit Judge

ATTEST:

[stamp] s/ P. Douglas Sisk [stamp]
P. Douglas Sisk, Clerk
DATED: FEB 23, 1998

Certified as a true copy and issued in lieu of a formal mandate on April 16, 1998.

Teste: [stamp] s/ [illegible] [stamp]

Chief Deputy Clerk, United States Court of Appeals for the Third Circuit

APPENDIX B — DECISION AND ORDER OF THE U.S. DEPARTMENT OF LABOR, BENEFITS REVIEW BOARD DATED APRIL 28, 1997

U.S. Department of Labor Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 96-1059

BERNARD KEIFER, SR.

Claimant-Petitioner

v.

HOLT CARGO SYSTEMS, INCORPORATED

Self-Insured
Employer-Respondent

DATED ISSUED: APR 28 1997

DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

David M. Linker (Freedman and Lorry, P.C.), Philadelphia, Pennsylvania, for claimant.

Stephen J. Harlen and Barbara D. Huntoon (Swartz, Campbell & Detweiler), Philadelphia, Pennsylvania, for self-insured employer.

Appendix B

BEFORE: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (95-LHC-1143) of Administrative Law Judge Robert D. Kaplan rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, while working for employer as a tractor-trailer driver at employer's marine terminal, sustained a work-related injury on June 16, 1993, when a piece of steel pipe he was loading onto his trailer fell on his left ring finger. Claimant was temporarily totally disabled from June 16, 1993 until April 27, 1994, when he returned to his employment with employer. The parties stipulated that claimant sustained a 17.5 percent permanent partial disability with regard to his left ring finger. *See* 33 U.S.C. §908(c)(10). The parties further stipulated that claimant was injured on a covered situs pursuant to Section 3(a) of the Act. 33 U.S.C. §903(a)(1988). The only issue before the administrative law judge was whether claimant satisfied the status element of jurisdiction set forth in Section 2(3) of the Act, 33 U.S.C. §902(3)(1988).

In his Decision and Order, the administrative law judge found that claimant's maritime work of transporting equipment used in loading and unloading vessels to and from the terminal was an insignificant portion of claimant's total work time, and thus

concluded that claimant failed to establish the status requirement for coverage under the Act. Accordingly, the administrative law judge denied claimant's claim for permanent partial disability compensation.

On appeal, claimant contends that the administrative law judge erred in finding that his occasional transporting of equipment used in loading and unloading is insufficient to bring him within the Act's coverage. Employer responds, urging affirmance of the administrative law judge's Decision and Order.

While maritime employment is not limited to the occupations specifically enumerated in Section 2(3), claimant's employment must be an integral or essential part of the chain of events leading up to the loading, unloading, building or repairing of a vessel. *See generally Chesapeake & Ohio Ry. Co. v. Schwalb,* 493 U.S. 40, 23 BRBS 96 (CRT)(1989); *Sea-Land Service, Inc. v. Rock*, 953 F.2d 56, 25 BRBS 112 (CRT)(3d Cir. 1992); *Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935, *reh'g denied*, 910 F.2d 1179 (3d Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991). A claimant is covered under the Act if he spends at least some of his time engaged in indisputably covered activities. *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 69, 6 BRBS 150 (1977). A claimant's time need not be spent primarily in longshoring operations if the time spent is more than episodic or momentary. *See Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981).

In the present case, claimant's duties as a tractor-trailer driver required him to transport cargo from the terminal to other piers or warehouses, pick up empty containers and return them to the terminal; in describing his work duties, claimant stated that he

would "customarily" assist in the loading of his truck, "just to be nice," but did not specify how often he would render such assistance. *See* Tr. at 33. However, claimant testified, and employer agreed, that 95 percent of his job duties consisted of hauling cargo to and from terminals, *see* Tr. at 39, 57, activity not covered under the Act. *See Caputo*, 432 U.S. at 267, 6 BRBS at 161; *Dorris v. Director, OWCP*, 808 F.2d 1362, 19 BRBS 82 (CRT)(9th Cir. 1987). With regard to the remainder of claimant's work time, claimant testified that part of his job consisted of picking up equipment used in the loading and unloading process (usually forklifts) from the terminals, transporting them for repairs, and returning them to the terminals. Tr. at 26-27. Claimant testified that he might do this type of work 4 to 6 times in a month, or he might do it only once in a month. Tr. at 27. He stated later that in the six months prior to his June 1993 injury, he performed this task "maybe 20 times." Tr. at 43.

In his Decision and Order, the administrative law judge interpreted the Supreme Court's decision in *Caputo* as requiring that an employee perform "essentially" longshore work to satisfy the status element of Section 2(3), inferring that "an employee who spends only a small portion of his time doing longshore work" would not be covered. Decision and Order at 4. Next, the administrative law judge determined that the time claimant spent transporting equipment used to load and unload vessels constituted covered maritime activity. *Id.* at 6; *see, e.g., Atlantic Container Service, Inc. v. Coleman*, 904 F.2d 611, 23 BRBS 101 (CRT)(11th Cir. 1990). However, finding that claimant spent "at most" 5 percent of his time performing this activity, the administrative law judge determined that this amounted to an insignificant portion of claimant's total work, and thus, concluded that claimant was not a covered maritime employee under Section 2(3) of the Act.

Appendix B

We hold that the administrative law judge applied the wrong legal standard in determining claimant's status under the Act. Contrary to the administrative law judge's determination, where a claimant is "directed to regularly perform *some* portion of what was indisputably longshore work," he is covered under the Act. *Boudloche*, 632 F.2d at 1348, 12 BRBS at 734 (emphasis in original); *see also Schwabenland v. Sanger Boats*, 683 F.2d 309, 16 BRBS 78 (CRT)(9th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); *Graziano v. General Dynamics Corp.*, 663 F.2d 340, 14 BRBS 52 (1st Cir. 1981)(cases rejecting the Board's use of a "substantial portion" test). In *Boudloche*, the United States Court of Appeals for the Fifth Circuit found that an employee who was engaged in unloading ships 2½ to 5 percent of his overall work time was covered under the Act, stating "[o]ur decision does not undertake to define the point at which a worker's employment in maritime activity becomes so episodic it will not suffice to confer status. That point was clearly not reached here." *Boudloche*, 632 F.2d at 1348, 12 BRBS at 734. The United States Court of Appeals for the First Circuit defined the term "episodic" as an activity that is "discretionary or extraordinary" as apposed to that which is "a regular portion of the *overall* tasks to which [claimant] could have been assigned . . ." *Levins v. Benefits Review Board*, 724 F.2d 4, 8 16 BRBS 24, 33 (CRT)(1st Cir. 1984)(emphasis in original). In the instant case, the administrative law judge found that claimant's work activities transporting equipment used in the loading and unloading process constituted maritime activity. The administrative law judge then found that claimant spent 5 percent of his time engaged in this activity. Furthermore, claimant's supervisor, Paul Rand, testified that claimant would be assigned the activity of transporting loading and unloading equipment. Tr. at 55-56. Thus, although claimant's assigned overall duties and cannot be said to have been discretionary or extraordinary. *See generally Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994).

Appendix B

The administrative law judge's finding that claimant spent 5 percent of his time in covered activity is not challenged by employer on appeal. Under the precedent set in *Caputo*, claimant is entitled to coverage under the Act based on the finding, as it establishes that claimant spent at least some of his time engaged in the loading and unloading process. *See McGoey v. Chiquita Brands International*, __ BRBS __, BRB No. 96-593 (Jan. 28, 1997); *Ferguson v. Southern States Cooperative*, 27 BRBS 16 (1993). Inasmuch as the administrative law judge improperly required that claimant's work must be substantially devoted to covered activity, we reverse his finding that claimant is not an employee covered under the Act. The administrative law judge's denial of benefits is thus vacated, and the case is remanded for the entry of a permanent partial disability award pursuant to the parties stipulations.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is reversed, and the case is remanded to the administrative law judge for the entry of an award of permanent partial disability benefits pursuant to Section 8(c)(10) of the Act, 33 U.S.C. §908(c)(10), reflecting a 17.5 percent impairment to the left ring finger.

SO ORDERED.

s/ Betty Jean Hall
BETTY JEAN HALL, Chief
Adminstrative Appeals Judge

s/ Roy P. Smith
ROY P. SMITH
Administrative Appeals Judge

s/ Regina C. McGranery
REGINA C. McGRANERY
Administrative Appeals Judge

APPENDIX C — DECISION AND ORDER OF THE U.S. DEPARTMENT OF LABOR, OFFICE OF ADMINISTRATIVE LAW JUDGE, DENYING BENEFITS DATED APRIL 29, 1996

U.S. Department of Labor Office of Administrative Law Judges
2600 Mt. Ephraim Avenue
Camden, New Jersey 08104

Case No. 95-LHC-01143

OWCP No. 02-111795

In the matter of

BERNARD KEIFER, SR.

Claimant

v.

HOLT CARGO SYSTEMS, INC.

Employer

Appearances:

David M. Linker, Esq.
For Claimant

Stephen J. Harlen, Esq.
For Employer

Appendix C

DECISION AND ORDER
DENYING BENEFITS

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, *et seq.*, (the "Act") and the regulations promulgated thereunder. A hearing was held before me in Camden, New Jersey on November 7, 1995 at which time the parties were given the opportunity to offer testimony and documentary evidence, and to make oral argument. The parties submitted post-hearing briefs.

I. *Stipulations and Contentions of the Parties*

The parties entered into the following stipulations:

1. Claimant sustained an injury to his left ring finger on June 16, 1993 at Employer's marine terminal in Camden, New Jersey.

2. Employer's Camden, New Jersey terminal is a covered situs under Section 3(a) of the Act.

3. Employer is an employer within the meaning of Section 2(4) of the Act.

4. An employer-employee relationship existed between Employer and Claimant.

5. The June 16, 1993 injury arose out of and in the course of Claimant's employment with Employer.

6. As a result of the injury, Claimant was temporarily totally disabled from June 16, 1993 to April 27, 1994, when he returned to his job with Employer.

7. In addition to temporary total disability, the injury caused Claimant to sustain permanent partial disability to the extent of 17.5 percent loss of use of the left ring finger.

(J-1, 2; TR 13-14)[1]

Claimant contends that he is covered by the Act. Employer takes the contrary position.

II. *Issues*

The sole issue to be resolved is whether Claimant has the status of an "employee" under Section 2(3) of the Act and, therefore, is a "longshoreman" whose June 16, 1993 injury comes within the jurisdiction of the Act.

III. *Findings of Fact and Conclusion of Law*

A. *Summary of the Evidence*

Claimant has been employed by Employer since January 1970 as a truck driver. Claimant's duties are to drive a tractor-trailer

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1. The following abbreviations are used herein: "J" denotes a joint exhibit of the parties; "E" denotes Employer's exhibit; and "TR" denotes the transcript of the hearing on November 7, 1995.

J-2 is a letter from Employer's counsel dated November 15, 1995 setting forth the parties' stipulation regarding the date on which Claimant returned to his job with Employer. I herewith receive J-2 in evidence.

hauling cargo from Employer's maritime terminals to other locations and to deliver cargo from other locations to Employer's maritime terminals. Claimant testified that 95 percent of his work was away from the terminal hauling freight. (TR 21-22, 28-30, 35) Occasionally, Claimant hauled equipment such as fork lifts and small trucks to various locations at the Camden terminal or to or from a repair shop located at another pier. On occasion, Claimant himself drove the equipment on or off his trailer. This equipment is regularly used by other employees in loading and unloading ships at the terminal. (TR 22-24, 26-27, 42-45)

On June 16, 1993 at the Camden terminal, steel pipe which had been unloaded from a ship was being loaded onto a trailer by Employer's longshore or stevedore employees. Claimant, who was to use a tractor to haul the pipe away from the terminal to a customer, testified that "just to be nice to help each other" he was assisting the other employees in the loading of the pipe into the trailer. In this process, Claimant suffered the injury to his left ring finger when a pipe standard fell on it. (TR 30-33)

Although Claimant contends that his injury occurred when he was helping out the other employees in loading the trailer, Claimant conceded that his job duties do not include loading or unloading vessels. Claimant testified that his primary duties are to drive the truck and to make sure that cargo loaded on the trailer is physically fastened down in the trailer. In fastening the cargo in the trailer, Claimant uses chains, stakes, and wooden blocks. (TR 20, 31-33, 35-36)

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B. *Claimant's Status as a Longshore Employee*

Section 2(3) of the Act provides:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations . . . .

Claimant contends that he is a covered employee under Section 2(3) because:

> (1) he "was actively participating in the loading of the cargo from the vessel at the time his injuries were sustained," and
>
> (2) "a portion of claimant's duties involve transportation of loads to and from vessels from [Employer's] warehouse facilities where cargo is either delivered or picked up by the eventual consignee of the cargo," and
>
> (3) "at least 5% of claimant's duties ~~re~~quire him to participate in activities necessary to maintain the equipment [used] to discharge and load cargo [from and onto ships]."

(Claimant's post-hearing brief, p. 10)

The seminal case in which the Supreme Court construed Section 2(3), which was enacted in the 1972 Amendments to the Act, is *Northeast Marine Terminal v. Caputo*, 432 U.S. 249 (1977). The Court noted that Congress, in the Committee Reports, expressed the intent to cover employees involved in loading,

unloading, repairing, or building a vessel. *Northeast*, 432 U.S. at 265 n.26.

Northeast described "typical" covered employees as those involved in "the essential elements of unloading a vessel — taking cargo out of the hold, moving it away from the ship's side, and carrying it immediately to a storage or holding area." The Court also stated that "persons who are on the [maritime] situs but are not engaged in the overall process of loading and unloading vessels are not covered." The Court stated:

> Thus, employees such as truckdrivers, whose responsibility on the waterfront is **essentially** to pick up or deliver cargo unloaded from or destined for maritime transportation are not covered.

Id. at 266-267; emphasis supplied.

Finally, *Northeast* noted that the Act "focuses primarily on occupations — longshoreman, harbor worker, ship repairman, [etc.]" and "demonstrate[s] a desire to provide continuous coverage throughout their employment to these amphibious workers who, without the 1972 Amendments, would be covered only for part of their activity." The Court concluded its analysis of Section 2(3) by stating:

> [W]hen Congress said it wanted to cover "longshoremen," it had in mind persons whose employment is such that they spend **at least some of their time** in indisputably longshoring operations . . . .

Id. at 272-273; emphasis supplied.

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As can be seen from the Court's two highlighted quotations, there is some ambiguity as to how much longshore work an employee must perform in order to be considered a longshoreman **at all times.** The first quoted statement from *Northeast*, that one who performs "essentially" non-longshore work is not covered, indicates the obverse: i.e., in order to be covered under the Act an employee I must perform "essentially" longshore work. It is obvious to me that this must be the applicable standard. Otherwise, the anomalous situation would exist that an employee who spends only a small portion of his time doing longshore work would be covered under the Act for injuries that occur at a maritime site while he is doing his usual non-longshore work.

The U.S. Court of Appeals for the Third Circuit, in whose jurisdiction this case arises, has provided some guidance with regard to this conundrum. In *Sea-Land Service. Inc. v. Rock,* 953 F.2d 56, 67 (3d Cir. 1992), the Court found that a van driver was not a covered employee despite the fact that he "occasionally" transported longshoremen at the maritime situs. The Court noted that the employee's "job description did not include such services, and separate buses existed to transport the longshoremen." The

Court concluded by stating:

> We cannot provide coverage for such infrequent activity undertaken by the employee.

We next turn to the three grounds on which Claimant rests his contention that he is an employee under Section 2(3).

Claimant's first contention is that he "was actively participating in the loading of the cargo from the vessel at the time his injuries were sustained." However, as the question is

whether Claimant, **overall**, was a longshore employee or a non-longshore employee, the nature of the duties he was performing at the specific time he was injured is all but irrelevant.[2]

Claimant next argues that "a portion of claimant's duties involve transportation of loads to and from vessels from ["Employer's] warehouse facilities where cargo is either delivered or picked up by the eventual consignee of the cargo." This cannot refer to Claimant's primary work activity — hauling cargo to and from the terminal. Further, *Northeast* clearly excluded the work of picking up cargo already unloaded from a vessel and that of delivering cargo to a terminal where it is later loaded onto a vessel.

Rather, Claimant's second argument appears to refer to the occasions on which he assisted other employees in loading the trailer "just to be nice." However, it is apparent that such work was not assigned to him by Employer. Therefore, this activity cannot be considered an essential part of Claimant's duties. *SeaLand Service, Inc. v. Rock*, 953 F.2d at 67 (absence of reference to longshore duties in the employee's job description). Further, there is no evidence in the record regarding the frequency of his "helping out" other employees in loading the trailer, other than what can be inferred from Claimant's statement that he performed truck driving work 95 percent of the time.

The last contention proffered by Claimant is that "at least 5% of claimant's duties require him to participate in activities necessary to maintain the equipment" used for loading and unloading vessels. This refers to the fact that on occasion Claimant transported such equipment around the terminal and to and from the repair shop. In addition, on some of those occasions Claimant

2. Of course, the "situs" test, as well as the "status" test, must be met for an employee's injury to be compensable under the Act. *Northeast*, 432 U.S. at 279.

rather than some other employee drove the equipment on or off the trailer. Claimant's testimony and that of Paul Rand, Employer's operations manager, could be construed to state that, at least some of the time, Employer's supervisors directed Claimant to perform such work or were aware that he was doing it. (TR 41-46, 55-56) However, it appears that this activity was a *de minimis* portion of his work, as Claimant testified:

> I might do it four, five, six times in a month and then I might only do it once in a month or twice in a month.

(TR 27) Subsequently, Claimant was asked how often he moved the equipment and how often he operated the equipment to get it on or off the transport truck in the year prior to his June 1993 injury. To this, Claimant stated:

> That's basically a hard question to say on how many times. . . . I'd say . . . maybe 20 times in the six months prior to that. As far as the driving [the equipment] on and off [the truck,] it depends on who's there [i.e., other employees who might operate the equipment], what terminal you're at and things in that nature.

(TR 43)

The transporting of the equipment, which is used to load and unload vessels, around the terminal and to and from a repair area, like the repair of such equipment itself, constitutes covered longshore work. *Chesapeake & Ohio Railway Co. v. Schwalb*, 493 U.S. 40 (1989). However, these functions constituted, at the very most, only 5 percent of Claimant's work. Further, Claimant's recollection and testimony were far from crystal clear with respect to the amount of time he spent transporting the equipment. And

20 such occasions in six months, or less than once a week, amounts to an insignificant portion of Claimant's total work time.[3]

Based on the foregoing, I find that Claimant's activities which constitute covered longshore employment are not an essential part of his job duties and are proportionally too minor to allow him to be considered an employee under Section 2(3) of the Act. Consequently, Claimant is not entitled to benefits under the Act.

ATTORNEY'S FEE

As I have found Claimant is not entitled to benefits, Claimant's counsel is not entitled to an attorney's fee under Section 28(a) of the Act.

ORDER

The claim of Bernard Keifer, Sr., for benefits under the Act is denied.

s/ Robert D. Kaplan
ROBERT D. KAPLAN
Administrative Law Judge

DATED: APR 29 1996
Camden, New Jersey

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3. The record contains no evidence with respect to how much time Claimant spent on each of those occasions. Nor does the record reveal how often Claimant hauled equipment from one terminal to another. Presumably, it took little time to transport equipment from one location to another on the premises of a single terminal. The *lacunae* in the record are Claimant's responsibility, as he bears the burden of proof.

Supreme Court, U.S.
FILED
JUN 16 1998
CLERK

No. 97-1874

In The

Supreme Court of the United States

October Term, 1997

HOLT CARGO SYSTEMS, INC.,

Petitioner,

vs.

BERNARD KEIFER, SR.,

-and-

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENT BERNARD KEIFER, SR.

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PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

STATEMENT OF THE CASE

The Petition accurately states the procedural background of the cases.

For purposes of deciding the propriety of review of the Third Circuit Court Order in this matter only, Respondent agrees that the Petition accurately states the factual background of the case.

REASONS FOR DENYING THE WRIT

The petition's factbound claim that the Third Circuit erred as a matter of law in affirming the Benefits Review Board does not warrant review by this Court. The decision below was a plainly correct application of settled law and no conflict among the circuits exists.

1. This Court has determined that Section 2(3) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 902(3) contains occupational, not geographical, requirements for coverage under the Longshore and Harbor Workers' Compensation Act and applies where either the claimant's occupation is specifically enumerated in Section 2(3) or because it falls within the general category of "maritime employment". *P.C. Pfeiffer Company, Inc. v. Ford,* 444 U.S. 69 (1979). This Court has further determined that a claimant is covered under the LHWCA if he spends at least some of his time in indisputably covered activities. *Northeast Marine Terminal Company v. Caputo,* 432 U.S. 249 (1977).

The petitioner's position in this case is entirely inconsistent with this Court's discussion of status issues in *Caputo.* There, this Court reviewed Congress' 1972 amendments to the LHWCA and noted that Congress intended to cover persons whose employment was such that they spent at least *some* of their time

in indisputably longshore activities and who, without the 1972 amendments, would be covered for part of their activity. While conceding that the evidence unequivocally establishes that the claimant spent 5% of his activity in covered maritime employment, Holt is essentially requesting that this Court overrule *Caputo's* "some time" test and substitute it with a test that would require a claimant requesting coverage under the LHWCA to demonstrate that a "substantial portion" of his work was maritime in nature. However, the "substantial portion" test has been discredited by the Board and every circuit that has addressed the issue. *Boudloche v. Howard Trucking Company,* 632 F.2d 1346, 1347 (5th Cir. 1980) [a claimant establishes status where two and a half to five percent of his overall work time was spent in maritime activity]; *Atlantic Container Service, Inc. v. Coleman,* 904 F.2d 611 (11th Cir. 1990) [a claimant who spent approximately four to six percent of his employment repairing maritime cargo equipment found to have established status under the LHWCA]; *Graziano v. General Dynamics Corporation,* 663 F.2d 340 (1st Cir. 1981) [a claimant has status under the LHWCA because a regular portion of his overall employment entailed cleaning out acid tanks and steel mill boilers work was indisputably maintenance of shipbuilding equipment]; *Lennon v. Waterford Transport,* 20 F.3d 658 (5th Cir. 1994) [where a majority of claimant's duties were clerical in nature but claimant's duties also required him to sort, pack and handle cargo destined to be loaded on vessels, status was established under the LHWCA].

Although the petition omits mention of the aforecited authorities, its crux is a factbound claim that the Third Circuit misapplied the *Caputo* standard. In fact, the decision below was a plainly correct application of *Caputo* based on the aforecited authorities.

2. Holt urges the Court to grant its petition for the purpose of resolving a conflict between a prior decision of the Third Circuit and its Order in this case as well as for the purpose of resolving a conflict between the decision of the Ninth Circuit and the Third Circuit's Order in this case. However, there is no genuine conflict between the Third Circuit decision and the prior decision of the Third Circuit and the Ninth Circuit.

Holt initially contends that the Third Circuit's Order in this case is inconsistent with its decision in the case of *Sea Land Service v. Rock,* 953 F.2d 56 (3rd Cir. 1992). There, the Third Circuit held that land based activity occurring within the LHWCA's "navigable waters", other than those activities explicitly listed under "maritime employment's" definition in the Act, should be deemed maritime only if it is an integral or essential part of the chain of events leading up to the loading, unloading or building of a vessel. The Third Circuit cited numerous cases with approval where claimants were found to have established status under the LHWCA due to the fact that their work activities had some close nexus to the loading or unloading of cargo from vessels. *See, e.g., Rock, supra*, 953 F.2d at 65; *Harvey Green Company v. Director, OWCP,* 639 F.2d 366 (7th Cir. 1981) [maintenance employee repairing the loading spout and bucket conveyors used to load barges and moving barge hatch covers to make barges available for loading held covered under LHWCA]; *Prolerized New England Company v. Benefits Review Board,* 637 F.2d 30 (1st Cir. 1980) [maintenance employee occasionally operating integrated loading system which polarized metal and facilitates its loading onto ships held covered under LHWCA; claimant also occasionally loaded the ship and repaired loading equipment when it broke down during the loading process], *cert. denied,* 452 U.S. 938 (1981).

Respondent respectfully submits that Holt's contention that the instant matter is inconsistent with *Rock* is without merit.

Petitioner has not requested *en banc* review by the Third Circuit of this case to resolve any intra circuit inconsistency that allegedly exists. Secondly, it is noteworthy that the author of the Third Circuit's Opinion in *Rock* was Circuit Judge Morton I. Greenberg. Judge Greenberg also sat on the panel in this case which voted unanimously to affirm the Board's Order reversing the Administrative Law Judge. If any conflict existed, it is reasonable to assume that Judge Greenberg would have noted same in the form of a concurring or dissenting opinion from the panel's order.

Respondent further submits that Holt's contention that a conflict in the circuits exists between the instant decision and the Ninth Circuit's decision in *Dorris v. Director, OWCP,* 808 F.2d 1362 (9th Cir. 1987) is misplaced. In *Dorris,* the Ninth Circuit held that a claimant/truck driver employed by a consignee who was injured when he slipped and fell while stepping down from the cab of his truck at the dock in Long Beach, California did not meet the status test because truck drivers transporting cargo from a berth at a dock to a berth at a different harbor did not engage in longshore work. *See Dorris, supra*, at 1364-1365. Mr. Keifer respectfully submits that his case raises several important distinctions from *Dorris*. First, Mr. Keifer was actively participating in loading of the cargo from the vessel at the time his injuries were sustained. Moreover, unlike *Dorris*, Mr. Keifer was employed by the company participating in the discharge of the cargo from the vessel. Additionally, irrespective of Mr. Keifer's status at the moment of his injury, there is no factual dispute that a portion of his duties involved transportation of cargo to and from vessels to Holt warehouse facilities where cargo is either delivered or picked up by the eventual consignee of the cargo. Finally, and perhaps most importantly, the claimant in *Dorris* did not have any duties requiring him to participate in activities necessary to maintain the equipment necessary to discharge and load cargo. Accordingly, *Dorris* is distinguishable from the circumstances of this case for the reasons stated above as well

as the reasons stated in *Rock* and the cases cited therein. Accordingly, there is no conflict in the circuits relative to the status issue involved in this case.

CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted,

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